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IN THE

Supreme Court of the United States

October Term, 1966

No. 563

NATIONAL SCREEN SERVICE CORPORATION,

Petitioner,

v.

THE POSTER EXCHANGE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Introductory Statement	3
Statement of the Case	4
Reasons for Granting the Writ	11
Conclusion	16

APPENDICES:

Appendix A—Statutory Provisions Involved	1a
Appendix B—Opinion of the Court of Appeals, filed June 20, 1966	2a
Appendix C—Memorandum Opinion of the District Court, filed February 24, 1965	8a
Appendix D—Judgment of the Court of Appeals, filed June 20, 1966	10a
Appendix E—Excerpts from Petition for Certiorari filed in *Vogelstein* v. *National Screen Service Corp., et al.* (E. D. Pa.) 204 F. Supp. 591, aff'd (3d Cir) 310 F. 2d 738, cert. den. 374 U. S. 840, reh. den. 375 U. S. 873	12a

Table of Citations

CASES:

Interborough News Co. v. Curtis Publishing Co. (2 Cir. 1955) 225 F. 2d 289	7
Lawlor v. National Screen Service Corp., et al. (3d Cir.), 270 F. 2d 146, cert. den. 362 U. S. 922	3, 6

CASES (Cont'd):

	PAGE
Lipp v. National Screen et al., Vogelstein v. National Screen et al., Siegel v. National Screen et al., Schrader v. National Screen et al., Mitchel v. National Screen et al., Riff v. National Screen et al. (E. D. Pa.), 188 F. Supp. 245, aff'd (3d Cir.) 290 F. 2d 321, cert. den. 368 U. S. 835	3
Locker v. American Tobacco Co. (2d Cir), 218 Fed. 447	7
National Screen Service Corp. v. The Poster Exchange, Inc. (5th Cir), 305 F. 2d 647	5, 13
The Poster Exchange v. Paramount Film Distributing Corp., et al. (N. D. Ga.), 35 F. R. D. 558, aff'd (5th Cir.) 340 F. 2d 320, cert. den. 381 U. S. 936	3, 6
United States v. National Screen Service Corp. et al., Civ. Action No. 75-138, 1957 C. C. H. Trade Cases, Par. 68, 670	5, 7
Vogelstein v. National Screen Service Corp., et al. (E. D. Pa.), 204 F. Supp. 591, aff'd (3d Cir.) 310 F. 2d 738, cert. den. 374 U. S. 840	2, 3, 7, 11, 13

STATUTES:

15 U. S. C. § 1	2
15 U. S. C. § 2	2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, National Screen Service Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on June 20, 1966, which reversed a Summary Judgment entered by the District Court for the Northern District of Georgia.

Opinions Below

The opinion of the Court of Appeals, which is reported at 362 F. 2d 571, is reprinted in the Appendix, p. 2a, *infra*. The opinion of the District Court, which is not reported, is reprinted in the Appendix, p. 8a, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on June 20, 1966 (Appendix, p. 10a, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Did the learned District Court—who granted summary judgment against the respondent-plaintiff herein because he felt that the sole issue of law presented "has been resolved by other courts in favor of defendant" correctly conclude—and did the learned Court of Appeals for the Fifth Circuit err when it reversed the District Court's conclusion—that the denial of certiorari by this Honorable Court in *Vogelstein* v. *National Screen Service Corporation*, 204 F. Supp. 591, aff'd 310 F. 2d 738, cert. den. 374, U. S. 840—should be deemed controlling as to the legal insufficiency of the claim asserted in respondent's complaint—when the principal ground asserted in the petition for certiorari in the *Vogelstein* case, *supra*, was that there was a conflict between the determination by the Court of Appeals for the Third Circuit in the *Vogelstein* case, 310 F. 2d 738, and the prior determination by the Court of Appeals for the Fifth Circuit in the instant case, 305 F. 2d 647—with respect to the identical legal issue arising out of identical factual allegations?

2. Is not the granting of certiorari by this Honorable Court clearly indicated in order to resolve the conflict in decisions between the Courts of Appeals for the Third and Fifth Circuits concerning a legal issue arising out of identical facts asserted in companion poster-renter cases—particularly in view of the fact that this Honorable Court had denied certiorari to the Court of Appeals for the Third Circuit in the *Vogelstein* case—the significance of which denial by this Court was recognized by the District Court and disregarded by the Court of Appeals for the Fifth Circuit?

Statutes Involved

The statutory provisions involved are 15 U. S. C. §§ 1 and 2. They are reprinted in the Appendix, p. 1a, *infra*.

Introductory Statement

The present case represents the last in a long line of successive private antitrust actions brought by the same or identically situated motion picture poster-renter plaintiffs, upon identical allegations and represented by the same attorney, against petitioner National Screen Service Corporation and various motion picture distributors. In this seemingly-endless succession of lawsuits, the respective plaintiffs (through their attorney, Francis T. Anderson, Esq.) persist in realleging the same charges of monopolization which have been repeatedly adjudicated against the plaintiff's contentions. Each adverse determination by a Court of Appeals against one of Mr. Anderson's clients resulted in an unsuccessful petition for certiorari before this Court.*

The decision of the learned Court of Appeals below, which reversed Summary Judgment granted to petitioner National Screen and remanded this case for trial, revives the judicially rejected charge after nearly two decades of harassing and expensive litigation involving those very same allegations which every Court—some upon admissions on depositions and others on admissions by counsel—found to be insufficient as a matter of law. We submit that the abuse of judicial process manifested in this case and the series of companion actions prosecuted by Mr. Anderson, cries out for the application of some measure which would deter further prosecution, in the name of newly-acquired

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* *Lawlor* v. *National Screen Service Corp., et al.* (3d Cir.), 270 F. 2d 146, cert. den. 362 U. S. 922; *Lipp* v. *National Screen et al., Vogelstein* v. *National Screen et al., Siegel* v. *National Screen et al., Schrader* v. *National Screen et al., Mitchel* v. *National Screen et al., Riff* v. *National Screen et al.*, (E. D. Pa.) 188 F. Supp. 245, aff'd (3d Cir.) 290 F. 2d 321, cert. den. 368 U. S. 835; *Vogelstein* v. *National Screen Service Corp., et al.* (E. D. Pa.), 204 F. Supp. 591, aff'd (3d Cir.) 310 F. 2d 738, cert. den. 374 U. S. 840, reh. den. 375 U. S. 873; *The Poster Exchange* v. *Paramount Film Distributing Corp., et al.* (N. D. Ga.), 35 F. R. D. 558, aff'd (5th Cir.) 340 F. 2d 320, cert. den. 381 U. S. 936.

litigants, by the same attorney asserting the same factual allegations and specious legal conclusions against petitioner. Just as there must be an end to litigation, there must also be a rational limit to a system which enables one attorney, by the device of representing successive parties identically situated, to subject a defendant to the overwhelming economic burden of defending against repeated assertion of the same legally frivolous allegations, despite unanimous judicial rejection and dismissal with prejudice —except in this instance.

Statement of the Case

This private treble-damage antitrust action involves the business of renting to motion picture theatres so-called "standard advertising accessories", i.e. posters and still photographs for display in theatre lobbies and on billboards. Respondent, The Poster Exchange, Inc., is a so-called "poster-renter" or jobber of advertising accessories. Petitioner, National Screen Service Corporation (hereinafter "National Screen") has for many years—since at least 1957—engaged in the business of manufacturing its own advertising accessories under *non-exclusive* licenses from motion picture distributors, and distributing such accessories not only directly to motion picture theatres but also to "jobbers" or "poster renters" such as the respondent herein.

The gravamen of respondent's complaint—in which petitioner was the sole defendant—is that Petitioner violated the antitrust laws by its notice in February, 1961, to all poster-renters, including respondent, that after May 16, 1961, petitioner would no longer supply to "jobbers" such as respondent, the motion picture advertising accessories which petitioner manufactured, but would thenceforth restrict its business to dealing directly with the consumers, i.e., the motion picture exhibitors.

Respondent's original complaint alleged that for many years respondent had purchased motion picture advertising material from petitioner, competing with petitioner in the business of renting to theatres the advertising accessories acquired from petitioner.* Respondent contended that unless petitioner (National Screen) is enjoined from discontinuing to make its advertising accessories available to respondent, respondent would be unable to compete with petitioner.

Petitioner moved for summary judgment on the basis of adjudications in actions brought upon the same allegations by other poster-renters in other Circuits. The district Court (Morgan, J.) denied the motion (198 F.Supp. 577) and, on appeal, the Court of Appeals for the Fifth Circuit affirmed, emphasizing that while discretion plays no role in the *granting* of summary judgment, a trial court "in the exercise of a sound discretion, may *decline* to grant summary judgment" and that in affirming the denial of summary judgment, the Court was "not here holding that National Screen is a monopoly; or that it has engaged upon a course of conduct which will establish it as such, either nationally or in the market area involved * * *" (305 F.2d 647, 651).

For almost two years thereafter awaiting trial, petitioner remained the sole defendant. However, on the eve

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* On March 29, 1957, a "Consent Decree" was entered in a Government antitrust suit in the United States District Court for the Southern District of New York, *United States* v. *National Screen Service Corp. et al.*, Civ. Action No. 75-138, reported in 1957 C.C.H. Trade Cases, Par. 68, 670. Simultaneously with the entry of that "Consent Decree", and *at the request of the Department of Justice*, there was read into the Record by the Government's attorney a letter dated March 29, 1957, from *National Screen* (Petitioner herein), representing to the Department of Justice, National Screen's intention to continue to make available to poster-renters such as respondent, for a *period of one year* after the entry of the "Consent Decree", petitioner's advertising accessories which it manufactured. That year expired on March 28, 1958.

of trial, in March 1963, Mr. Anderson (of Philadelphia) who, since the commencement in 1949 of *Lawlor* v. *National Screen, et al.*, had been attorney for all of the poster-renter cases throughout the country (except *Smith* v. *National Screen* in Oklahoma City), was substituted as respondents' attorney herein, and moved for leave to amend the complaint, adding five motion picture distributors as defendants, for the first time in this case charging all defendants with having conspired to monopolize the business of distributing motion picture advertising accessories. The distributor-defendants promptly moved for summary judgment—which motion was granted by the learned District Court, 35 F. R. D. 558, affirmed by the Court of Appeals for the Fifth Circuit, 340 F.2d 320, and certiorari was very recently denied by this Honorable Court; 381 U. S. 936.

In each of the prior companion actions (except the *Smith* case in the Oklahoma District Court, and the *Exhibitors Poster Exchange* case in the District Court in New Orleans), Mr. Anderson's contentions that National Screen and the film distributors had violated the antitrust laws were dismissed—in some cases after trial, and in others, upon the admissions elicited on depositions of the plaintiffs —and the dismissals affirmed by the appellate courts, climaxed in each case by this Honorable Court's denial of certiorari.

Thus, in *Lawlor* v. *National Screen Service Corp., et al.*, 270 F. 2d 146 (3d Cir.) cert. den. 362 U. S. 922, allegations of antitrust violations were dismissed after a trial, both on the facts and the law. In unanimously affirming the judgment based on 140 findings of fact, the Court of Appeals for the Third Circuit pointed out, among other grounds for affirmance, that the plaintiff poster-renter, there, as in the instant case, *"never attempted to obtain * * * licenses under which they themselves would manufacture accessories, and, in fact, have expressly stated that they do not desire such licenses"* (270 F. 2d at 154). The Court of Appeals further stressed that the antitrust laws do not accord a jobber the right to compel a manufacturer to deal

through a middleman in the distribution of its own products, citing *Locker* v. *American Tobacco* (2 Cir.) 218 Fed. 447, 450; and *Interborough News Co.* v. *Curtis Publishing Co.* (2 Cir. 1955) 225 F. 2d 289, 293 (*id* at pp. 154-6).

However, in the instant action, as in the amended complaint in the third *Vogelstein* case, *supra,* the respondent-plaintiff herein, expressly conceded in its complaint, that since at least 1957, petitioner has had only *non-exclusive* licenses—which, under the Consent Decree in *U. S.* v. *National Screen, et al., supra,* were and are also available to respondent. But in respondent's president's deposition, respondent conceded that its Board of Directors decided that respondent does not wish to manufacture but wants only petitioner's products.

In the companion action also instituted by Mr. Anderson as attorney for another poster-renter, *Vogelstein* v. *National Screen,* 204 F. Supp. 591, the Court held that petitioner had the legal right to adhere to its announced policy that after May 16, 1961, it would only deal directly with its consumers, *i.e.,* the motion picture theatres, to whom it leases its accessories, and would not supply its own accessories to poster-renter jobbers, of which respondent was one. In that third *Vogelstein* case, the precise allegations asserted by respondent in the instant case were pleaded in the amended complaint, and the District Court's determination that the complaint failed to state a claim for which relief could be granted (204 F. Supp. 591) was unanimously affirmed by the Court of Appeals for the Third Circuit (310 F. 2d 738), and this Honorable Court denied petitions for certiorari (374 U. S. 840) and for rehearing (375 U. S. 873).

As hereinabove noted, after summary judgment in favor of the defendant motion picture distributors removed the issue of conspiracy from the instant case, petitioner remained as the sole defendant, and the sole question tendered in the original complaint survived, *i.e.,* may a jobber poster-

renter such as respondent, having a right to procure its own non-exclusive license to manufacture its advertising accessories, prefer to avoid the risks and financial burdens involved in manufacturing under its own license, and compel its competitor (the petitioner herein)—who assumes these risks inherent in manufacturing its own product—to make petitioner's product available to the respondent jobber?

This legal question was conclusively resolved in favor of the petitioner, National Screen, in the *Vogelstein* case, *supra*, and even in the earlier *Lawlor* case; see pp. 6-7, *supra*.

Being fully aware of the conclusive effect of the affirmance by the Court of Appeals for the Third Circuit of the dismissal of the amended complaint in the *Vogelstein* case, and of the removal of the issue of conspiracy from the instant case, Mr. Anderson admitted that he had no case against petitioner and urged that the Court reinstate the issue of conspiracy.

Thus, at a pre-trial hearing on December 9, 1963—long *after* the conspiracy issue had been eliminated from the case—Mr. Anderson said:

> "I see no way to try this case, your Honor, except on a basis of a conspiracy that began in 1940".

The Court replied:

> "We are not going to retry the *Lawlor* case". (S.M. 12.)

Again, at page 81 of the transcript of the December 9, 1963 conference, the following colloquy between Mr. Anderson and the Court:

> "The Court: All right, sir. And if it is not a conspiracy case it is not any case at all?
>
> "Mr. Anderson: I should say that is right".

At the same pre-trial hearing of December 9, 1963, the learned District Judge, recognizing that the identical issue posed in the *Vogelstein* case as to National Screen's right to deal with its own customers directly rather than through jobbers was being asserted once again in the present case, asked this question:

> "The Court: Let me ask you this. Now how did *Vogelstein* and *Poster Exchange* differ?" (S.M. 26-7)

to which Mr. Anderson replied:

> " • • • all the cases throughout the country, the *Smith* case out in Oklahoma, *Lawlor* in Philadelphia and *Vogelstein* in Washington, wherever you go, as I see it, they are the same with respect to the proof of liability • • • " (*id.* 27).

Then, turning to the basic legal question as to whether or not a manufacturer can deal directly with his own customers and discontinue supplying its products to jobbers, the Court asked respondent's counsel, Mr. Anderson:

> "The Court: Don't we go back to the principle—and here is what I am trying to go on—don't we go back to the principle of whether or not a manufacturer can deal directly with his customers or whether or not they are required to deal through distributorships? Now, did the *Vogelstein* case—• • • hold that they were not required to?
>
> "Mr. Anderson: That's right." (S.M. 45)

Against this background of Mr. Anderson's concessions that respondent had no case in the absence of conspiracy, and that the only issue remaining in the case had already been adjudicated against the respondent-poster-renter's contentions, petitioner renewed its motion for summary judgment previously denied—but this time the motion was granted by Order of the District Court dated February 24, 1965, with the following observation:

> "The plaintiff's attorney has repeatedly admitted that he had no case against the defendant herein

unless this Court restored the long adjudicated issue of conspiracy, which this Court rejected in its Order granting summary judgment for the defendant on this issue. *Thus, it seems to this Court at the present time that there is no triable issue of fact and that only a question of law is presented for determination*

"This issue of law has been resolved by other courts in favor of the defendant. *Vogelstein* v. *National Screen Service Corporation*, 204 F. Supp. 591, aff'd. 310 F. 2d 738; *Lawlor* v. *National Screen Service Corporation*, 270 F. 2d 146, cert. den. 362 U. S. 922." (R. 15) (Emphasis added)

However, the Court of Appeals for the Fifth Circuit reversed the District Court and remanded the case for trial of the identical contention raised five years ago by Mr. Anderson in the *Vogelstein case*. The Court of Appeals in the instant case concluded that it should not depart from its prior decision (305 F. 2d 647) which had affirmed the District Court's denial of Petitioner's first motion for summary judgment. The Court refused to change its view even though in the interim, there occurred the Third Circuit's dismissal—as a matter of law—of the amended complaint in the *Vogelstein* case, and this Honorable Court's denial of certiorari where respondent's attorney Mr. Anderson, who was Petitioner's attorney in the *Vogelstein* case, stressed as the primary ground for certiorari, the conflicting determinations in the Third and Fifth Circuits of the same factual and legal issue.

The Court of Appeals' decision—if left in effect by this Honorable Court—sets the stage for the next act in Mr. Anderson's interminable campaign to exhaust petitioner with the expense and harassment of perpetual litigation. And petitioner, despite repeated judicial vindication, continues to be the victim of a lawyer's plan—which he launched and has continued since 1949—to continue to litigate the same legal issue arising out of the same factual

allegation concerning Petitioner's business decision to deal directly with its own consumer customer, and to discontinue furnishing its products to jobbers such as respondent herein—as long as our Courts will tolerate this abuse of the judicial process.

Reasons for Granting The Writ

I.

In holding that respondent is entitled to a trial of the very allegations which were held by the Court of Appeals for the Third Circuit in *Vogelstein* v. *National Screen, supra,* not to be actionable, the decision by the Court of Appeals in the instant case is in direct conflict with the determination by the Third Circuit in the *Vogelstein* case, presenting the identical legal issue arising out of the identical factual allegation as to petitioner's decision to deal directly with its own customers.

In the *Vogelstein* case, this Court denied the petitions for certiorari (374 U. S. 840) and for rehearing (375 U, S. 873) filed by Mr. Anderson, seeking a reversal of the Third Circuit's decision and adoption of the Fifth Circuit's prior conflicting decision herein.

Though at page 9, *supra,* we have quoted respondent's attorney's admission in his response to the District Judge's question as to "how did *Vogelstein* and *Poster Exchange* (the instant case) differ?"—conceding that "all the cases throughout the country, the *Smith* case out in Oklahoma, *Lawlor* in Philadelphia and *Vogelstein* in Washington, wherever you go, as I see it, they are the same with respect to the proof of liability * * *"—nevertheless, in order to conclusively satisfy this Honorable Court as to complete identity of the allegations in the respective complaints in the *Vogelstein* and instant cases—we set forth the determinative parallel allegations:

AMENDED COMPLAINT IN VOGELSTEIN v. NATIONAL SCREEN

"5. All of the defendants have continued, and are still continuing, as heretofore, to conspire to monopolize, and to monopolize, the business of distributing motion picture advertising posters by the same means and methods as alleged in the complaints filed in the aforesaid civil actions No. 11,678 of 1950 and No. 22,707 of 1957, except that on *May 16, 1961, defendant National Screen Service Corporation,* with the knowledge, consent and approval of all of the other defendants herein, *discontinued the practice of making available to plaintiff supplies of certain kinds of posters,* more particularly described in paragraphs 13, 14 and 15 of Exhibit A aforementioned, and ever *since May 16, 1961, said defendant had failed and refused absolutely to sell to or otherwise make available to plaintiff any supplies of posters of any kind, with the result that plaintiff has been forced to go out of business with respect to the distribution of the advertising posters* of the motion picture film companies that are named as defendants in this action". (Emphasis added)

AMENDED COMPLAINT IN THE INSTANT CASE

"15. On or about February 15, 1961, *plaintiff was notified by National Screen by letter of its refusal from and after May 16, 1961, to do further business with plaintiff.* Said refusal to deal was part of a nationwide program instituted by National Screen and affected not only plaintiff but other similarly situated poster exchanges throughout the United States. This action was taken by National Screen Service Corporation with knowledge, acquiescence and approval on the part of the above named motion picture distributor defendants, and was in furtherance of the aforesaid conspiracy of defendants to monopolize the business of distributing standard accessories on a national scale.

16. *Since May 16, 1961 National Screen has in fact pursued said announced policy of refusing to deal with plaintiff.* In spite of requests by plaintiff to be allowed to purchase motion picture accessories from National Screen as in the past, National Screen has been and is refusing to deal with plaintiff, and as a result *plaintiff has been unable*

> *since May 16, 1961, to obtain motion picture accessories on films distributed by or through the major distributors hereinabove named* * * *." (Emphasis added).

Thus, the very same allegations which were dismissed by all courts in *Vogelstein*—a dismissal which this Court refused to disturb despite two successive applications by Mr. Anderson stressing the conflicting view of the Court of Appeals in the Fifth Circuit in the instant case—are now again held by the Court of Appeals for the Fifth Circuit to entitle Mr. Anderson's client to a trial.

Respondent's attorney herein, Mr. Anderson, who was also Petitioner's attorney in the *Lawlor* and *Vogelstein* cases, had urged in this Court in his *Vogelstein* petition, that a conflict existed between the Third and Fifth Circuits. In his petition for certiorari in *Vogelstein*, which was filed after the Fifth Circuit's initial affirmance of the denial of summary judgment (305 F. 2d 647), Mr. Anderson asserted to this Court that *Vogelstein* and the instant case "are substantially the same" and sought to induce this Honorable Court to grant certiorari on the basis of conflict between *Vogelstein* and the earlier Fifth Circuit decision in this case.*

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* In his petition for certiorari in *Vogelstein* (p. 8) Mr. Anderson wrote:

> "The decision below is in conflict with the decision rendered by the Court of Appeals for the Fifth Circuit in National Screen Service Corp. v. The Poster Exchange, Inc., 305 F. 2d 647 (Cir. 5, July 11, 1962)."
>
> * * *
>
> "That case and this case are substantially the same, and it is plain that the Court of Appeals for the Fifth Circuit rejected all of the basic reasoning that lies behind the decision of this case."

For more extensive quotation from Mr. Anderson's petition in the *Vogelstein* case, in this Court, we respectfully refer to Appendix E, *infra*.

Petitioner herein respectfully submits that by declining to follow *Vogelstein* and adhering to its own earlier decision, the Fifth Circuit disregarded an intervening judicial determination of finality of this Court, which by its denial of certiorari in *Vogelstein*, must have made a deliberate choice of the decision in *Vogelstein* vis-a-vis the prior decision in the Fifth Circuit in the instant case.

Accordingly, the present case squarely presents the situation described in this Court's Rule 19(b), since unquestionably "a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter * * *". Indeed, we believe that seldom is this Court presented with a more striking and precise conflict between two Circuits. since here the conflicting appellate decisions involve not only "the same matter" in an abstract legal sense, but the identical legal issue based on the identical factual allegations, charging the same defendant in each case, and the same attorney representing plaintiffs in each case. The instant case, we respectfully submit, presents a text-book example of the kind of situation in which this Honorable Court should exercise its certiorari jurisdiction, in order to resolve conflict and thus insure a rational consistency of decisions in the Federal Courts.

II.

In addition to the conflict between the Courts of Appeals for the Third and Fifth Circuits, we submit that the instant case warrants certiorari as "an exercise of this Court's power of supervision" over the lower Federal Courts (Rule 19(b) of this Court). We believe that the present case, in the context of all the poster-renter litigation prosecuted by Mr. Anderson's clients since 1949, represents the kind of abuse of the Federal judicial process which should evoke this Honorable Court's concern and intervention so that other parties may not similarly be victimized by attorneys

who hope to coerce settlements made by defendants unwillingly to incur the very substantial cost of defending these actions.

As attorney for the poster-renters, Mr. Anderson (except on two occasions in association with other counsel) has prosecuted 12 separate antitrust suits against National Screen—nine in Philadelphia, two in New Orleans, and one (the instant case) in Atlanta. This Court has frequently emphasized the importance of the private treble-damage action as a vehicle for antitrust enforcement, but the continued effectiveness of this important privately-instituted litigation depends upon its prosecution in a responsible manner. When the private antitrust action is permitted to become an instrument of coercion, it no longer fulfills the honorable economic purpose which Congress intended.

In the instant case, petitioner faced full trial and repeated appellate reviews of the poster-renters' contentions, which were determined in every instance in favor of petitioner. If, by the simple device of instituting an endless series of actions by identically situated plaintiffs, an attorney can compel the same defendant to answer the same antitrust allegations over and over again in different Federal Courts throughout the country, there is a serious weakness in private damage action procedures which permits the law to be an instrument to coerce settlements and surrender of legal rights. Judicial vindication in each of a series of individual cases offers hollow triumph to a defendant who must bear the overwhelming expense of extensive litigation over many years (in this case since 1949), and repeated favorable judgments only heightens the frustration of continued harrassment.

Petitioner respectfully submits that in the exercise of its supervisory control over the lower Federal Courts, this Honorable Court should review the instant case and once and for all, resolve any doubt which might still exist in

the minds of some Judges that the decision in the *Vogelstein* case is correct, and that, as a matter of law, a poster-renter jobber has no vested right to require a manufacturer—who, under a *non-exclusive* license, chooses to sell its product directly to the consumer, i.e., the motion picture theatre—to sell its manufactured products to the jobber (who *declines* to procure its own non-exclusive license to manufacture its own products), in order that the jobber may continue in business without taking any of the risks of manufacturing its own accessories.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully urges that this Petition for a Writ of Certiorari, be granted.

Respectfully submitted,

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APPENDIX A

Statutory Provisions Involved

15 U. S. C. § 1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal • • • "

15 U. S. C. § 2.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor • • • "

APPENDIX B

Opinion of the Court of Appeals Filed June 20, 1966

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22673

THE POSTER EXCHANGE, INC.,

Appellant,

versus

NATIONAL SCREEN SERVICE CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

(June 20, 1966.)

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and KILKENNY,* District Judge.

TUTTLE, Chief Judge: This is a private action, seeking treble damages for an alleged violation of Section 2 of the

* Of the District of Oregon, sitting by designation.

Appendix B—Opinion of the Court of Appeals
Filed June 20, 1966

Sherman Act.[1] The district court previously denied defendant's (appellee here; hereinafter referred to as defendant) motion for summary judgment, and that action was upheld by this Court at 305 F.2d 647 (5th Cir. 1962). In so affirming, this Court outlined the facts and the history of the litigation between these parties, as well as other relevant litigation, noting defendant's success in defending similar charges in the courts. The crux of that opinion, for present purposes, lies in this Court's summary, at 651-52, of the legal principles which would govern upon trial as follows:

> "Illegal monopolies are condemned by the Sherman Antitrust Act 15 U.S.C.A. § 1 et seq. Every illegal monopoly is condemned regardless of the circumstances which brought it into existence. The law does not condition its condemnation upon a history of misconduct or baleful practices. Indeed, a position of illegal monopoly may be achieved by enterprise and sagacity. . . . In practically all cases where a course of conduct is under inquiry, the universal test seems to be whether there is 'any purpose to create or maintain a monopoly.' . . . Thus, it has been held that *absent monopoly,* an individual has full freedom to sell or buy from any person for any reason. Such is the rule in cases involving exclusive dealing, . . . unilateral refusals to buy, . . .

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[1] Section 2 reads, in relevant part:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

Appellant's Section 1 claim, along with the alleged conspiracy upon which it was based, has been eliminated from this case. Poster Exchange, Inc. v. National Screen Service Corp., 35 F. R. D. 558 (N. D. Ga. 1963), aff'd per curiam 340 F. 2d 320 (5th Cir. 1965).

> the right to refuse to deal, . . . There are numerous other circumstances and factual situations where the same test has been applied. Ultimately, the courts must decide under the facts in each case the point at which freedom to trade must give way to control under § 2 of the Sherman Act. An individual's freedom to trade in the market is unqualified so long as a monopoly is not sought or enjoyed."

In response to defendant's contention that plaintiff is in no position to complain of defendant's unlawful activity (assuming, arguendo, such a monopoly exists), because plaintiff, under the protective provisions of a previous consent decree entered in a suit between the Government and defendant, could have applied to motion picture producers for its own non-exclusive licenses to manufacture and distribute motion picture advertising accessories, the Court said, at 305 F.2d 652,

> "that the possibility of obtaining substitute facilities is not a sufficient answer if there is in fact a monopoly; or if the facts show that the course of conduct complained about tends to promote the achievement of a complete monopoly to the extent that will deprive the public of the advantages which flow from free competition in interstate commerce."

Finally, the Court discussed a prior case, *Lawlor* v. *National Screen Service Corp.*, 270 F.2d 146 (3d Cir. 1959), upon which defendant, both then and now, places great reliance. In *Lawlor* it was held, *after a trial on the merits,* that defendant did not monopolize or attempt to monopolize within the meaning of Section 2 of the Sherman Act. Concerning *Lawlor,* this Court said:

> "The facts and the period of time involved in the Lawlor case are substantially different from those

under consideration in the instant case. In the Lawlor case the facts were fully developed. Here, we are considering the refusal of the trial court to grant a summary judgment with limited facts presented by affidavits and one deposition."

Upon remand of this case, defendants renewed their motion for summary judgment. The district court, relying upon "admisisons" of plaintiff's attorney that his case against defendant depended upon his prevailing on the conspiracy issues,[2] and stating that it was in agreement with cases resolving "this issue of law" in favor of the defendant,[3] granted the motion.

As to the allegedly fatal "admission" to the lower court by plaintiff that his case would rise or fall with the court's disposition of the conspiracy issue, it should be noted that the statement upon which the district court relied appeared solely in the context of plaintiff's case against the motion picture distributors.[4] Certainly, in attempting to describe his Section 1 case against *all* of the defendants, plaintiff's attorney should not be held to have relinquished his Section 2 claim against National Screen. To give this statement such a binding effect would discourage frankness and candor on the part of attorneys in their relationships with the judiciary. Accordingly, we hold that plaintiff made no fatal admission regarding his Section 2 case against National Screen.

This leaves this case in exactly the same posture as this Court found it on the first appeal, with one possible excep-

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[2] By this time the conspiracy issue had been resolved against plaintiff, see note 1, *supra*.

[3] Citing Lawlor, *supra*, and Vogelstein v. National Screen Service Corp., 204 F. Supp. 591 (1962), *aff'd per curiam*, 310 F. 2d 738 (3rd Cir.), *cert. denied*, 374 U. S. 840, *reh. denied*, 375 U. S. 873.

[4] See note 1, *supra*.

tion: The supervening *per curiam* pronouncement of the Third Circuit in *Vogelstein* v. *National Screen Service Corp.*, 310 F.2d 738 (1962), *cert. denied*, 374 U.S. 840, *reh. denied*, 375 U.S. 873. With regard to *Vogelstein*, it should be noted that the opinion of the district court (the only opinion written in that case), granting National Screen's motion to dismiss, relied largely upon the *Lawlor* case, which, as noted above, was fully considered by this Court on the first appeal. Moreover, the *Vogelstein* opinion does not cite the Supreme Court cases upon which plaintiff bases its contention that defendant has violated Section 2 of the Sherman Act—cases which, according to this Court, 305 F.2d 651-52 (and the lower court initially, 198 F.Supp. 561), entitled plaintiff to a trial on the merits.

Nor is it true, as urged by defendant, that the Supreme Court's denial of certiorari in *Vogelstein* is in any sense a legal "determination" in favor of the view of the Third Circuit. In the words of the Court:

> "a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard."

Brown v. *Allen*, 344 U.S. 443, 492 (1953) (Mr. Justice Frankfurter stating the position of a majority of the Court on this point). See also *United States* v. *Shubert*, 348 U.S. 222, 228-29, note 10 (1955); *Wright, Federal Courts* Section 108 at p. 431 (1963 ed.).

Although the "law of the case" doctrine, as applied in the federal courts, "does not rigidly bind a court to its former decisions, but is only addressed to its good sense," *Higgins* v. *California Prune & Apricot Grower, Inc.*, 3 F.2d 896 (2d Cir. 1924), nevertheless, since that rule is "based

upon sound policy that when an issue is once litigated and decided, that should be the end of the matter,'' *Fontainebleau Hotel Corp.* v. *Crossman,* 286 F.2d 926, 928 (5th Cir. 1961), some good reason must be shown why the prior ruling is no longer applicable or should not be followed, in order to justify a departure therefrom. See 1 A *Moore's Federal Practice* ¶ 404[1] at pp. 4201, 4204 (2d ed. 1961). The *Vogelstein* case did not change the law. The Supreme Court has held more than once that Section 2 of the Sherman Act forbids refusals to deal for monopolistic ends.[5] The same facts which the district court and this court initially found to be in issue, are still in issue. The considerations which dictated this Court's well-considered affirmance of the district court's initial dismissal of defendant's motion for summary judgment, 305 F.2d 647, are still valid. Accordingly, since the defendant's renewed summary judgment motion raised no new legal issues not foreclosed by the mandate of this Court at 305 F.2d 647, the judgment is REVERSED and the case is REMANDED for proceedings not inconsistent with this opinion.

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[5] See Lorain Journal Co. v. United States, 342 U. S. 143, 155 (1951); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359, 375 (1927); see also United States v. Klearfax Linen, Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945).

As stated in the 1955 *Report of the Attorney General's Committee to Study the Antitrust Laws* at 137:

> "A refusal to deal may lend itself to abuse as an instrument of monopoly power, and can implement a broader course of conduct in restraint of trade. Hence we believe that only thoroughgoing factual inquiry into the surrounding business circumstaces can characterize a refusal to deal as part of a restrictive course of conduct incompatible with antitrust objectives."

APPENDIX C

Memorandum Opinion of the District Court Filed February 24, 1965

On January 22, 1965, the United States Court of Appeals for the Fifth Circuit entered an Order affirming this Court's Judgment of December 10, 1963, wherein judgment was entered in favor of Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Incorporated, Twentieth Century Fox Film Corporation, United Artists Corporation and Warner Brothers Picture Distributing Corporation. This judgment resulted from the granting on July 2, 1963, of a motion for summary Judgment filed on behalf of these motion picture distributor defendants.

On January 31, 1964, the defendant in this case filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure contending that as a result of the entry of the aforementioned judgment no genuine issue as to any material fact remained, and that therefore the defendant was entitled to judgment as a matter of law. This Court, on February 20, 1964, denied this motion for summary judgment, stating in the opinion that it would be improper to express an opinion as to the legal soundness of the plaintiff's case at a time when an order disposing of one of the principal areas of the plaintiff's suit is on appeal. This situation has now been corrected by the Fifth Circuit's affirming this Court's Order of December 10, 1963. Therefore, the motion for summary judgment will now be considered.

The plaintiff's attorney has repeatedly admitted that he had no case against the defendant herein unless this Court restored the long adjudicated issue of conspiracy, which this Court rejected in its Order granting summary judgment for the defendant on this issue. Thus, it seems to this Court at the present time that there is no triable issue of

Appendix C—Memorandum Opinion of the District Court Filed February 24, 1965

fact and that only a question of law is presented for determination.

This issue of law has been resolved by other courts in favor of the defendant. *Vogelstein* v. *National Screen Service Corporation*, 204 F. Supp. 591, aff'd. 310 F. 2d 738; *Lawlor* v. *National Screen Service Corporation*, 270 F. 2d 146, cert. den. 362 U. S. 922.

This Court is in agreement with the findings of the above-cited cases and hereby grants the defendant's motion for summary judgment.

IT IS SO ORDERED.

This the 24th day of February, 1965.

LEWIS R. MORGAN,
United States District Judge.

APPENDIX D

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22673

D. C. Docket No. 7665—Civil Action

THE POSTER EXCHANGE, INC.,

Appellant,

versus

NATIONAL SCREEN SERVICE CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and KILKENNY,* District Judge.

* Of the District of Oregon, sitting by designation.

Appendix D—Judgment of the Court of Appeals

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, National Screen Service Corporation, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

June 20, 1966

Issued as Mandate: July 14, 1966

Court Costs:
Docketing cause, etc. $25.00

APPENDIX E

Excerpts from Petition for Certiorari

filed in

***Vogelstein v. National Screen Service Corp. et al* (E. D. Pa.) 204 F. Supp. 591, aff'd (3d Cir.) 310 F. 2d 738, cert. den. 374 U. S. 840, reh. den. 375 U. S. 873**

[Pages 8-10]

"ARGUMENT

I

A.

"The decision below is in conflict with the decision rendered by the Court of Appeals for the Fifth Circuit in *National Screen Service Corp.* v. *The Poster Exchange, Inc.*, 305 F. 2d 647 (Cir. 5, July 11, 1962).

"Assuming that the court below was justified in acting on matters dehors the record, a very wrong conclusion was reached if the Court of Appeals for the Fifth Circuit correctly decided the case of *National Screen Service Corp.* v. *The Poster Exchange, Inc.*, 305 F. 2d 647 (Cir. 5, July 11, 1962).

"That case and this case are substantially the same, and it is plain that the Court of Appeals for the Fifth Circuit rejected all of the basic reasoning that lies behind the decision of this case.

"For example, in both cases the defendants contended that that their conduct was authorized by the terms of the aforementioned Consent Decree that had been entered against them in the year 1957 by District Judge Sugarman, of New York, N. Y., in the case of *United States* v. *National Screen Service Corp., et al.* (C. C. H. 1957 Trade Cases, paragraph 68,670); and in the instant case the court based its decision, inter alia, on that Consent Decree, whereas the

Court of Appeals for the Fifth Circuit rejected it completely as a basis for decision.

"More fully, in the instant case the district court said (204 F. Supp. 591, 597, Appendix A, infra, pp. 19, 35):

> '. . . a consent decree was entered into in the Southern District of New York on March 29, 1957, by which the major motion picture producers agreed to grant only non-exclusive licenses to producers and distributors of advertising accessories: 1957 Trade Cases, paragraph 68,670. That circumstance can only serve to weaken Vogelstein's claim'.

"On the other hand, the Court of Appeals for the Fifth Circuit held this Consent Decree wholly inapplicable for a number of reasons, among which was that the decree provided, in effect, that only those poster distributors having 'a national distribution organization' could demand an opportunity to obtain the supplies necessary for competition with National Screen Service Corporation (305 F. 2d note 2, pp. 649, 650). In this connection the court pointed out that National Screen Service Corporation 'is the only concern' in this country that possess a national distribution organization' (*id.* at p. 654).

"It is evident that the Court of Appeals for the Fifth Circuit had no difficulty in seeing through the smoke screen created by this Consent Decree. Since under that Decree everyone was left out in the cold except those having 'a national distribution organization', it is plain that the Decree benefited no one except National Screen Service Corporation, against whom it was supposed to operate. Plainly the Decree was fashioned by National Screen Service Corporation for its own benefit, and plainly the Court of Appeals for the Fifth Circuit was able to see that 'something is rotten in the state of Denmark'.

"This case therefore may well serve as an illustration

of the great evil that can be done through the practice of settling government anti-trust cases by entry of consent decrees.

"Therefore this case should not be allowed to die until the circumstances that led to the entry of the New York Consent Decree have been investigated. The question of the validity of that Consent Decree will naturally arise in the trial of the Fifth Circuit case, and also, of course, in the trial of the instant case if it ever comes to trial. Therefore, it is submitted, certiorari should be allowed in order to ensure uniformity of the law in the Fifth and Third Circuits, especially with respect to the question of how much respect should be given to the New York Consent Decree".

[Page 18 et seq.]

"What the court in the Fifth Circuit held was that National Screen must stand trial on that issue.

"There is no reason why a similar trial should not be held in this circuit.

"In the instant case, the gist of what was said in the opinion of the District Judge Luongo with respect to the all-important amended complaint was as follows (Appendix A, *infra*, at p. 36; 204 F. Supp. 591, at p. 597):

> '. . . The amended complaint is the same as Vogelstein #3 (the original complaint) with the exception that it contains the additional allegation that National Screen, with the knowledge and consent of the other defendants, has, since May 16, 1961, discontinued making standard accessories available to Vogelstein *thereby compelling him to go out of business.*
>
> 'Accepting that additional allegation as true, we are not led to a different conclusion. The refusal to supply accessories to Vogelstein lacks significance absent a setting of conspiracy or monopoly. . . .' (Emphasis added)

Appendix E—Excerpts from Petition for Certiorari

"But the question to be decided is whether or not the act of putting Vogelstein out of business is indicative of 'conspiracy or monopoly'.

"Therefore Judge Luongo's opinion begs the question".

* * *

"SUMMARY

"*Certiorari* should be granted in this case for several reasons:

"1. * * *

"2. * * *

"3. The Court of Appeals for the Fifth Circuit has refused to dismiss a similar case without a trial on the merits, and since that case is now pending, and must soon be tried, this case also should be kept alive, and sent to trial, because otherwise it cannot be said that justice is administered in the federal courts in an evenhanded manner.

"4. The fact that the Court of Appeals in this case* avoided even mentioning the conflicting opinion of the Court of Appeals for the Fifth Circuit,** and failed to write any opinion, constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision."

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* Referring to *Vogelstein* case.

** 305 F. 2d 647.